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No. 95-992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia Circuit

BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL

Of Counsel:

JUDITH A. MCHALE
MARK HOLLINGER
DIANE L. HOFBAUER
DISCOVERY COMMUNICATIONS, INC.
7700 Wisconsin Avenue
Bethesda, MD 20814
(301) 986-1999

ALBERT G. LAUBER, JR. *
PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHTD.
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000

* *Counsel of Record*

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QUESTION PRESENTED

Whether, in the absence of any jeopardy to the health of the overall system of free, local broadcast television (nationally or in particular markets), the First Amendment permits Congress to impose on all cable operators a requirement of mandatory carriage of local broadcast stations in preference to all other programmers.

PARTIES TO THE PROCEEDINGS

Plaintiffs:*

Atlanta Interfaith Broadcasters, Inc.
A&E Television Networks
Black Entertainment Television, Inc.
Daniels Cablevision, Inc.
Discovery Communications, Inc.
E! Entertainment Television, Inc.
Lifetime Entertainment Services
International Family Entertainment, Inc.
The Learning Channel
National Cable Satellite Corporation d/b/a C-Span
National Cable Television Association, Inc.
National Interfaith Cable Coalition, Inc.
QVC, Inc.
Time Warner Entertainment Company, L.P.
The Travel Channel, Inc.
Turner Broadcasting System, Inc.
USA Networks

Defendants:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
Federal Communications Commission
The International Association of Machinists and Aerospace Workers, AFL-CIO

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* Appellants' Rule 29.6 disclosure statements are set forth at J.S. App. 144a.

International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
United States of America
Zantech, Inc.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-112a) is reported at 910 F. Supp. 734.

JURISDICTION

The district court's judgment (J.S. App. 153a) was entered on December 20, 1995. The notice of appeal and the jurisdictional statement were filed on December 21, 1995 (J.S. App. 149a), and this Court noted probable jurisdiction on February 20, 1996. Jurisdiction rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act" or "the Act"), are reprinted at J.S. App. 113a-143a.

STATEMENT

Discovery Communications, Inc., and The Learning Channel concur in the other appellants' statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants submit this separate brief to emphasize two points. First, section 5 of the 1992 Cable Act, which affords a must-carry preference to public broadcasters, is unconstitutional under any level of First Amendment scrutiny. Second, sections 4 and 5 are both unconstitutional under the "narrow tailoring" prong of the *O'Brien* test because switch-and-antenna capacity represents a workable less restrictive alternative to must-carry.

A. In enacting must-carry, Congress has mandated that cable operators prefer one set of speakers (television broadcasters) over another set of speakers (cable programmers), without regard to the viewing preferences of cable subscribers or the editorial decisions of the operators themselves. In the parties' initial appearance before this Court, defendants sought to justify this discrimination on a ground that was, at least in theory, substantial: preserving the existing system of free over-the-air television for the 40% of TV viewers who do not subscribe to cable.

On remand, defendants conceded that the local broadcasting system is in no jeopardy from cable and that the public's access to "free TV" is not at risk. Defendants accordingly

urged, and Judge Sporkin adopted, a new rationale for must-carry: enhancing the financial well-being of the relatively small subset of broadcasters — generally, little-watched UHF and third-tier public stations in heavily-saturated markets — that actually elect must-carry. As Judge Williams has shown, this new rationale is not the objective Congress posited, and it is both circular and fundamentally illegitimate.

The public broadcasters made the same strategic retreat as the Government and the commercial broadcasters, although their new rationale has a slightly different spin. The evidence on remand indisputably established that (1) the public broadcasting system is in excellent financial health and grew at a strong rate in the absence of must-carry; and (2) the vast majority of public stations would be carried by cable operators without government intervention. Indeed, the public broadcasters could not identify a single station that has failed, gone dark, or suffered cognizable harm from an adverse carriage decision.

Faced with this evidence, the public broadcasters abandoned any pretense of proving systemic harm, asserting instead a congressional objective to promote "universal access" to public television. By "universal access," they mean carriage of each and every, present or future, public station on all cable systems, at the expense of competing cable networks (like Discovery and TLC) that offer similar documentary and educational programming. This theory is a more candid version of the "more is better" rationale that infects defendants' submission generally. But as articulated by the public broadcasters, it is essentially content-based, for it rests on the assertion that public programming is "different" or "better" and thus worthy of maximum public support.

At the end of the day, the public broadcasters have not shown, and do not contend, that must-carry is necessary to preserve the health of the public broadcast *system* — that is, the

ability of public stations to present a diverse mix of programming to over-the-air viewers nationwide. Rather, they seek mandatory carriage on cable systems in order to *expand* their reach to viewers who are unable to receive their signals, or who receive them poorly, thus realizing more fully their goal of "universal access." In demanding "universal access" to cable viewers at the expense of competing cable programmers, the public broadcasters are seeking a subsidy that Congress cannot grant consistently with the First Amendment.

B. Even if the defendants could identify a legitimate and substantial governmental interest, a means of achieving it without discriminating against cable programmers is readily available — education of cable subscribers in the acquisition and use of an inexpensive input-selector ("A/B") switch. Together with a receiving antenna, this switch enables cable subscribers to receive broadcast stations not carried on their cable system to the same extent such stations are available to their neighbors who do not subscribe to cable.

The availability of switch-and-antenna capability as a preferable alternative to must-carry rules was recognized by the D.C. Circuit in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985), *cert. denied*, 476 U.S. 1169 (1986), adopted by the FCC in its 1986 and 1987 Reports reinstating a more limited set of "interim" must-carry rules, and embraced again by the D.C. Circuit when rejecting those interim rules in *Century Communications Corp. v. FCC*, 835 F.2d 292 (1987), *cert. denied*, 486 U.S. 1032 (1988). Prior approval of switch-and-antenna capability by the FCC and a unanimous D.C. Circuit surely creates a *prima facie* case that it is an acceptable alternative to any must-carry scheme.

As Judge Williams explains, the evidence on remand overwhelmingly confirms this conclusion. Switching from cable to off-air reception is a simple exercise entailing no significant cost, in time or money, for the viewer. Thousands of cable

subscribers successfully used A/B switches in 1993 to watch broadcasters dropped from cable during a "retransmission consent" dispute. And A/B switches are used effortlessly by millions of subscribers to DBS and other distribution services.

Defendants oppose switch-and-antenna capacity as an alternative to must-carry for two main reasons. They contend that some cable subscribers may be too lazy or disinterested to acquire A/B switches; and they urge that, even with an A/B switch, some subscribers may be unable to receive a broadcast signal because of distance or terrain obstacles. However, as Judge Williams points out, possible consumer lethargy cannot be a legitimate basis for impairing cable programmers' First Amendment rights. And while broadcasters may have a fair claim to Government assistance to ensure their access to viewers *they can reach over-the-air* (which is all that their broadcast license entitles them to), commandeering cable channels to *extend* broadcast signals to viewers *they could not otherwise reach* stands on a wholly different footing. This latter objective, which underlies all the defendants' submissions below, is a fundamentally illegitimate preference for the financial interests of broadcasters over the First Amendment rights of competing cable speakers.

ARGUMENT

I. THE MUST-CARRY PROVISIONS HAVE ADVERSELY AFFECTED PLAINTIFFS' EXERCISE OF THEIR FIRST AMENDMENT RIGHTS

Discovery Communications, Inc. ("DCI") is a cable programmer: it creates video programming and distributes that material through cable systems nationwide. It currently operates two major programming networks: The Discovery Channel and The Learning Channel. Both are dedicated to the provision of high-quality documentary and educational

programming aimed at people who watch television to broaden their understanding of the world.

The Discovery Channel ("Discovery") was founded in 1985 and is now a well-established basic cable network with more than 63 million subscribers. In a November 1994 survey, Discovery ranked first among basic cable networks in terms of perceived value and importance to viewers. J.A. 984. DCI acquired The Learning Channel ("TLC") in early 1991, invested more than $40 million to upgrade its programming, and relaunched it in October 1991. J.A. 984-985. In a November 1994 survey, TLC ranked first among mid-sized cable networks in terms of perceived value and importance to viewers. Similarly, in a December 1994 survey of cable executives, TLC ranked first among emerging cable networks in terms of the overall appeal of its programming. J.A. 985.

TLC incurred operating losses in 1991, 1992, 1993, and 1994. It is now carried on about 20% of U.S. cable systems and has about 32.4 million paying subscribers. As a start-up network, TLC usually competes for one of the last available channels (if any) on a cable system. In order to achieve financial viability, it is essential that TLC increase its subscribership by obtaining carriage on additional cable systems. J.A. 985.

The must-carry provisions have harmed TLC, and to a lesser extent Discovery, in a variety of ways. TLC and Discovery suffer First Amendment injury whenever a cable system not now carrying them is forced to add a must-carry broadcaster. Whether or not Discovery and TLC would enjoy a *certainty* of carriage absent the must-carry law, the addition of each marginal broadcaster reduces the number of slots for which Discovery and TLC may compete. This discriminatory impairment of cable programmers' ability to reach an audience constitutes First Amendment injury *per se*.

Apart from this generic harm, TLC can trace harmful effects on at least 31 specific cable systems directly to the must-carry law. These are systems that, because of the must-carry provisions: (a) have been unable to launch TLC; (b) have been forced to drop TLC; (c) have been unable to extend TLC full-time carriage from current part-time carriage; (d) have been forced to demote TLC from full-time to part-time carriage; or (e) have been forced to delay launching TLC for significant periods of time. Executives of these 31 cable systems have confirmed that they had no available channel capacity at the relevant time, and that, but for obligations imposed by must-carry, TLC would have enjoyed full-time carriage on each system for the past several years. J.A. 985-986, 989-997.

As a result of these adverse actions, TLC has lost, or failed to secure, approximately 1,800,000 full-time subscribers since October 1992. J.A. 987. The loss of these subscribers has compromised TLC's ability to reach its desired audience and exercise its First Amendment rights. No less impaired are the First Amendment rights of TLC's prospective viewers. By forcing cable systems to discriminate against TLC's programming — which is uniformly highly valued by viewers — in favor of marginal and little-watched broadcasters, Congress has treated cable subscribers' viewing preferences as irrelevant. "This conscious disregard of subscribers' viewing preferences is difficult, if not impossible, to reconcile with [this] Court's repeated admonition that the interests of viewers should be considered 'paramount' in the First Amendment calculus." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

By causing TLC to lose subscribers, the must-carry law has also inflicted economic harm. As a result of non-carriage or reduced carriage on the 31 cable systems described above, TLC has forfeited up to $1.75 million annually in gross revenues

since 1992. This revenue loss stems from a combination of reduced advertising income and foregone license fees. J.A. 986-988.

II. DEFENDANTS HAVE FAILED TO PROVE A SUBSTANTIAL GOVERNMENTAL INTEREST

A. The Government's Actual Interest, Far From Being "Substantial," Is Illegitimate

When initially before this Court, the Government's defense of must-carry rested on the submission that, absent the statute, "the economic viability of free local broadcast television * * * will be seriously jeopardized" (Act § 2(a)(16)). This Court took defendants at their word. "[I]n applying *O'Brien* scrutiny," Justice Kennedy stated, "we must first ask whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry." *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2470 (1994).

Put to the proof, defendants on remand completely changed their characterization of the "governmental interest" alleged to support must-carry. They explicitly abandoned any contention that the *system* of local broadcasting is at risk, or that must-carry is needed to ensure the existence of "free TV" for viewers who do not subscribe to cable. Instead, defendants posited a more modest objective, newly coined to match their evidentiary showing: "protection of financially weak stations" with a view to ensuring "the widest possible dissemination of information from diverse and antagonistic sources." Govt. Opp. Br. 6, 13; NAB Opp. Br. 61, 63-64, 69; Pub. Opp. Br. 7, 24.

Defendants on remand offered varied formulations of this new theme. The public broadcasters said that Congress aimed to promote "universal access" to all public stations. Pub. Opp. Br. 24. At times, NAB contended that Congress legislated "to

prevent a material reduction in the diversity of [broadcast] programming" or in "the quality of broadcast service." NAB Opp. Br. 18-19, 69. At other times, NAB asserted that Congress could permissibly legislate "to maintain, *or even enhance*, the quantity and quality of local broadcasting available to noncable households." *Id.* at 61, 64 (emphasis added).

Missing from all these formulations was any contention that *the system* of local broadcasting is at risk. Indeed, defendants could concede the system's perpetual health and still advance the argument they made below — that must-carry encourages entry of *more* stations, helps those stations offer *more* programming, enables that programming to be of *higher* quality, and thus promotes "the *widest possible* dissemination of information." Govt. Opp. Br. 13 (emphasis original). Reduced to its essentials, defendants' justification for must-carry was simply that "more is better."

Judge Sporkin largely accepted defendants' eleventh-hour submissions concerning this supposed "governmental interest." He deemed it irrelevant that "the economic health of the broadcasting industry *as a whole* is not in genuine jeopardy." J.S. App. 8a-9a n.11 (emphasis added). "The relevant inquiry," he said, concerns the health "of those broadcasters protected by the must-carry provisions," that is, the relatively small number of stations that actually elect must-carry instead of demanding payment for retransmission consent.

Defendants have retreated to an indefensible position, and Judge Sporkin followed them there. The governmental interest that defendants now assert is not the interest that Congress identified, and it is certainly not the interest whose genuineness and substantiality this Court required the Government to demonstrate on remand. Under defendants' revisionist view, must-carry seeks merely to enhance the prosperity *of some individual broadcasters* — existing stations with minimal

viewership, and potential new entrants that find guaranteed cable carriage advantageous in securing investment financing. But it cannot plausibly be contended that maximizing the fortunes of every would-be broadcaster is necessary to preserve the health of the *local broadcast system*. By many measures, this country's economic "system" is now in good health. But the system's strength does not hinge on the permanent financial viability of every single entrepreneur.

As compared with the interest that the Government previously urged upon this Court, the objective defendants now advance is trivial or worse. The Government theoretically has a substantial interest in preserving the system of free, over-the-air broadcasting from destructive, anticompetitive action. But that interest is not implicated here because the systemic risk that Congress hypothesized is "merely conjectural," not real. *Turner*, 114 S.Ct. at 2470. In effect, must-carry is a mere form of wealth redistribution — a subsidy for marginal individual broadcasters, funded by a tax on cable speakers and their subscribers. The desire to effect such a wealth transfer does not constitute a "substantial government interest" justifying infringement of First Amendment rights. "Indeed," as the D.C. Circuit has previously held, "were the individual broadcasters themselves the object of [must-carry's] favors, the objective itself would be fundamentally illegitimate." *Quincy Cable TV, supra*, 768 F.2d at 1460.

In any event, this Court should hold the Government to the standard that Congress enunciated. The must-carry law is unconstitutional because the system of local broadcasting is not in jeopardy. Defendants' new-found "governmental interest" is a transparent attempt to turn the *effect* of must-carry into its *purpose*. This Court has previously refused to allow parties to evade their burden under First Amendment scrutiny by equating the effects of the statute with the governmental interest at stake. *Simon & Schuster, Inc. v. New York State Criminal Victims Bd.*,

502 U.S. 105, 120 (1991) (disapproving attempt to "take[] the effect of the statute and posit[] that effect as the State's interest").

B. The Public Broadcasters Have Not Shown A Substantial Governmental Interest

In this brief, we rely largely on our co-plaintiffs' submissions to show the error of defendants' assertions concerning the health of broadcasting generally. We will, however, address certain allegations of harm advanced by the public broadcasters. Discovery and TLC produce educational and documentary programming that is highly valued by viewers. Public stations pride themselves on offering similar fare, and they compete directly with Discovery and TLC for viewers.

1. *The Public Broadcasting System Thrived In The Absence Of Must-Carry*

Public broadcasting has enjoyed continuous growth since its inception, with the number of public stations increasing every year since 1953. J.A. 834-835, 851-853. From 1985 to 1992 — a period without must-carry rules — the number of public TV stations increased from 316 to 368. J.A. 329, 852-853. Public broadcasters' member revenues during these years grew faster than rate of inflation.[1] Thus, the public broadcasting industry was generally healthy and growing. *See also Public Television Service and Structure Analysis* (prepared for APTS) (May 1991), J.A. 2112-2113.

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[1] *See, e.g., Public Television in the Information Age* (prepared for the Association of America's Public Television Stations ("APTS")) (July, 1994) (J.A. 2129-2130, 2133-2134); *Viewer and Listener Membership Income for Public Television and Radio Grantees - Fiscal Year 1991*, CPB Research Notes (Sept. 1992) (J.A. 199); *Public Broadcasting Income - Fiscal Year 1993* (Dec. 1994) (J.A. 313-314); APTS, *Critical System Objectives for Public Television - 1992 Status Report* (Oct. 1992) (J.A. 2115-2116).

The public broadcasters concede that there was no evidence before Congress that a single public station has ever gone bankrupt, ceased operations, or turned in its license. Pub. Br. 39 n.53. The president of APTS in deposition testimony stated that no public station has ever gone dark. J.A. 328-329. Defendants in their briefs below identified no public station that is now, or has ever been, in serious financial difficulty. And they offer no theory explaining why public stations should be a target of future anticompetitive conduct: noncommercial broadcasters do not sell advertising and thus do not compete with cable operators for advertising dollars. The bottom line is that the public broadcasting system, as of 1992, was perfectly healthy and in no jeopardy from cable. Any jeopardy it currently faces arises, not from cable, but from an increasingly cost-conscious Congress.

On remand, APTS compiled a "master list" showing that a total of 63 public stations had been dropped by cable systems on 130 occasions between 1985 and 1992. J.A. 1184-1185, 1199-1212. This compilation disclosed markedly fewer drops than APTS had alleged in earlier submissions to Congress, which Judge Sporkin credited. *See* J.S. App. 12a (citing 1987 APTS study).[2] In any event, defendants did not contend that these editorial decisions of cable operators had harmed the public broadcast system in any way. Defendants' own lead expert testified that only the least watched 15% of noncommercial stations experienced carriage problems in the

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[2] Dr. Bernadette McGuire, APTS's Director of Planning and Research, reexamined the data that APTS submitted to Congress and concluded that "quite a few" of the stations claimed to have been dropped "hadn't been dropped at all". *See* J.A. 360-361. A 1991 APTS survey, finding only 12 public stations dropped by cable systems within a 50-mile radius, concluded that "drops and shifts of public television stations * * * are not occurring with great frequency." APTS, *Harm to PTV Stations from Cable System Shifts and Drops* (Aug. 1991), J.A. 121-125.

absence of must-carry, and those stations were usually the third noncommercial station in markets with more than two such stations. J.A. 450-452, 453, 458. Public TV stations occupy approximately 16,500 cable channels nationwide, and the 130 drops set out in the APTS master list comprise less than 1% of this total.[3]

The public broadcasters presented no factual evidence to quantify the financial harm they allegedly experienced from cable drops. In a half-hearted effort to estimate such harm, they presented a "hypothetical model" constructed by one of their employees. J.A. 1038-1042. Using a variety of assumptions, this model argued that a station's loss of cable carriage may result in lower viewership, which in turn may result in lost viewer contributions, which taken cumulatively with other stations' losses may damage the entire public television system. J.A. 1043-1047. This argument is precisely the sort of conjecture that this Court has deemed insufficient to meet defendants' burden of proof. *Turner*, 114 S.Ct. at 2470 ("recited harms [must be] real, not merely conjectural"). And the public broadcasters' hypothetical model is undermined by

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[3] A broadcast station will typically be carried by numerous cable systems within the geographical reach of its signal; a "drop" refers to its removal from any one of those systems. The harm occasioned by a drop must be assessed in light of this fact. For example, if a station carried by 25 cable systems reaching 250,000 subscribers is dropped by one system having only 5,000 subscribers, the harm experienced by that broadcaster will be minuscule, especially since the station will continue to reach 100% of its over-the-air audience. Overall, there are about 355,000 cable channels occupied by programming in the United States. J.A. 694. Approximately 20%, or 71,000, of those channels are occupied by broadcast stations. J.A. 1152-1154. Since there are approximately 1,550 broadcast stations, on average each broadcast station is carried by about 45 cable systems. In rough terms, therefore, the Nation's 368 public TV stations occupy about 16,500 channels. *See* J.A. 853.

the facts: as explained above, public stations' viewership and revenue during 1985-1992 steadily *increased* each year without must-carry.

2. *The Governmental Interest Urged By The Public Broadcasters Is Illegitimate*

Confronted with the evidence below and the concessions of their own experts, the public broadcasters ultimately disavowed any obligation to show that their economic health is "seriously jeopardized." Pub. Br. 15 n.10, 40-41; *see* Pub. Reply Br. 37 ("Congress did not assume that the entire public television system was in jeopardy without must-carry"). This new stance marked a sharp contrast with their earlier submissions to this Court, in which they urged the necessity of must-carry to "preserve *the institution* of local public broadcasting." Brief of Public Broadcasters in No. 93-44, at i (stating question presented).

The public broadcasters' new theory on remand started with the premise that Congress, having appropriated taxpayer funds to support public television, wished to encourage "universal access" to it. Pub. Br. 11, 14, 19-20. From that premise, they reasoned that the Government may act to prevent public stations from losing *any* viewers, since the goal of "universal access" will then be realized more completely. In order to "promot[e] the widespread dissemination of multiple sources of information," the public broadcasters posited a substantial governmental interest in "[e]nsuring that *all* Americans * * * have access to *all* of their local public television stations and that *all* of these stations remain financially viable." *Id.* at 58-59 (emphasis added).

This rationale is a more candid version of the fundamentally illegitimate "more is better" rationale that infects must-carry generally. As articulated by the public broadcasters, moreover, this rationale is essentially content-based. Despite

their mantra of "universal access," they have never explained why some communities must have five public stations when others have two, or why that fifth station should have priority over *any* cable programming seeking access to the same channel, regardless of viewer interest.[4] After all, it is the interests of the viewers, not the broadcast stations, that Congress said it was protecting. *See* Act § 2(a)(1), (17) & (19).

The closest the public broadcasters came to a rationale for "universal access" was the suggestion that public broadcasting is "different" and uniquely deserving of public support. *See* Pub. Br. 16-19; Pub. Reply Br. 44, 45 n.64. As producers of high-quality educational and documentary programming, Discovery and TLC strongly dispute the notion that noncommercial programming is "better" in any sense of the word. But the conclusion the public broadcasters seek to draw from this premise — preferential access to cable, justified by the allegedly superior content of their speech — in any event is incompatible with the First Amendment.

Equally problematic is the public broadcasters' invocation of "diversity." Unlike the governmental interest that Congress identified and the Government previously advanced, the "diversity" goal proffered by the public broadcasters has no principled limits. "Diversity" is a highly subjective and an infinitely expandable concept. However "diverse" public programming is now, it is presumably capable of becoming "more diverse" if existing stations expand or improve their programming and new public stations enter the market. Taken to its logical extreme, the public broadcasters' argument would justify *any* infringement of speech under the *O'Brien* test, so

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[4] For cable systems with more than 36 channels, the Act requires carriage of *all* qualified local public broadcasters, except those whose programming substantially duplicates that of another public station already being carried. Act §§ 5(b)(1) & 5(e).

long as the ultimate effect was to enhance public television's well-being.

The public broadcasters' "diversity" argument is essentially a euphemism for "discrimination." Public broadcasters have an alternative medium, wholly distinct from cable, for distributing their speech. Unlike Discovery and TLC, they enjoy a license to transmit their signals over the air — granted to them for free — and they also receive substantial public financing. The public broadcasters have not explained how "diversity" is enhanced by enforced cable carriage of *every* public station at the expense of cable programmers like Discovery and TLC, which likewise offer high-quality documentary and educational programming.

"[A]part from content-based paeans to the quality of its programming," the only argument the public broadcasters make to support their claim to preferential carriage is that "the public is already subsidizing public television and is entitled to protect its investment." J.S. App. 102a (Williams, J., dissenting); *see* Pub. Br. 20. Judge Williams showed the error of this contention. The public broadcasters have cited no precedent, and we know of none, for the proposition that Congress can discriminate against one group of speakers in order "to enhance the value of a previously granted subsidy" to a competing group of speakers (J.S. App. 102a). This argument plainly proves too much: if such bootstrapping were sufficient, the Government could always satisfy the "substantial interest" prong of the *O'Brien* test, as to any action that advantaged a favored speaker, simply by subsidizing that speaker, then using the subsidy to justify discriminatory treatment of the speaker's competitors.

In sum, the public broadcasters have not shown, and do not contend, that must-carry is necessary to preserve the health of the public broadcast system — that is, the ability of public stations to present a diverse mix of programming to over-the-

air viewers nationwide. Rather, they seek mandatory carriage on cable systems in order to *expand* their reach to viewers who are unable to receive their signals, or who receive them poorly, thus realizing more fully their goal of "universal access." This objective is plain on the face of the statute: if a cable system operates in an area where no public signal is available over-the-air, it must import and carry the signal of at least one public station *from another community*. 47 U.S.C. § 535(b)(3)(B). In demanding "universal access" to cable viewers at the expense of competing cable programmers, the public broadcasters are seeking a preference that Congress cannot grant consistently with the First Amendment.

III. "SWITCH-AND-ANTENNA" CAPABILITY IS A CONSTITUTIONALLY ACCEPTABLE, LESS RESTRICTIVE ALTERNATIVE TO ANY MUST-CARRY REGIME

Broadcast television, by its nature, requires that viewers install antennas to receive signals over-the-air. Americans for decades have used receiving antennas to watch television without the benefit of cable service, and approximately 38% of the public today does not subscribe to cable. J.A. 763-764; *see* H.R. Rep. 102-628, 102d Cong., 2d Sess. 30 (1992) (noting that cable passed 95% of households in 1992, while only 60% subscribed). At least 36 million U.S. households are currently using antennas to view television off-the-air. J.A. 764.

The advent of cable created the potential for impairing subscribers' off-air reception capacity, since antennas were often disconnected from the back of the TV set when cable was installed. It has always been recognized, however, that a simple switch — called an "input selector" or "A/B switch" — permits the antenna to remain in place and thus enables a cable subscriber to alternate at will between cable and off-air reception of broadcast signals. By use of this switch, a cable subscriber is free to choose "between cable's offerings and all

the television programming that would have been available to the viewer if cable had never been installed." J.S. App. 103a (Williams, J., dissenting).

We submit that switch-and-antenna capability — and any measures that Congress reasonably believes would encourage consumers' convenient use of it — represents a constitutionally permissible, less restrictive alternative to any must-carry regime. There is no justification for impairing cable speakers' First Amendment rights if subscribers can readily view off-air any broadcasters that cable systems decline to carry.

In the pages that follow, we will first show that the FCC and the D.C. Circuit have previously approved switch-and-antenna capability as a constitutionally-preferable alternative to must-carry. Second, we will show that the evidence on remand — including expert testimony, practical experience in the cable industry, and successful use of A/B switches in such alternative distribution technologies as DBS and MMDS — confirms that the Commission and the D.C. Circuit were correct in embracing this option. Third, we will show that Judge Sporkin erred in discerning "substantial evidence" to support Congress's rejection of A/B switches in the 1992 Act. As Judge Williams correctly concluded in his dissent (J.S. App. 41a), the evidence overwhelmingly demonstrates that

> Every cable household can secure as good access to over-the-air television as it had before adopting cable simply by (1) retaining or acquiring the sort of antennae that the uncabled 40% of households necessarily use, and (2) operating either an input selector switch on their "remote" or an "A/B" switch that can be acquired at a local hardware store for a trivial sum.

A. The FCC And The D.C. Circuit Have Previously Approved Switch-And-Antenna Capability As A Less Restrictive Alternative

1. ***The Quincy Decision.*** In an opinion written by Judge Wright and joined by Judge (now Justice) Ginsburg and Judge Bork, the court of appeals unanimously held the FCC's original must-carry rules unconstitutional. *Quincy Cable TV*, *supra*, 768 F.2d 1434. The FCC's defense of those rules rested on the assumption that "cable subscribers would cease to view local television signals unless such signals were carried by the cable system" (768 F.2d at 1441). But "connection of the cable," the court noted, "typically has no direct effect at all on receipt of UHF signals." And while the cable was usually attached to the receiver's VHF input terminal, the FCC acknowledged that "an inexpensive switch (the 'A/B switch') would enable a viewer to alternate between cable and off-air VHF signals." The court thus observed that, "in principle, a cable subscriber with little or no effort could still view local broadcasts even without the benefit of the must-carry rules" (*ibid.*).

When first issuing must-carry rules in 1965, the FCC had cited possible impediments to successful use of A/B switches. *See* 768 F.2d at 1441 (citations omitted). But "[i]n the two decades since the rules' original promulgation," the FCC had never reexamined what the court described as "the admittedly speculative links in [its] chain of reasoning" (*id.* at 1457). The court thus held that must-carry could survive First Amendment scrutiny only if the FCC provided support for the two assumptions that were "the linchpins of its analysis" (*ibid.*):

> (1) that without protective regulations cable subscribers would cease to view locally available over-the-air television either because they would disconnect their antennas or because the inconvenience of switching would deter them; and (2) that even if some cable subscribers did abandon local

television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.

2. ***The FCC's Response To Quincy***. Following notice-and-comment rulemaking, the FCC reconsidered its earlier pronouncements and adopted a "two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation." *See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864 (1986), ¶ 1 ("1986 Report"), *reconsidered in part*, 2 FCC Rcd. 3593 (1987) ("1987 Report"). The first part of this program "require[d] cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning * * * the need for maintaining off-the-air reception capability." The second part consisted of interim must-carry rules designed to "provide an orderly transition to a new environment." 1986 Report ¶ 1.

The FCC concluded that use of antennas, coupled where necessary with A/B switches, did indeed offer the best long-term method of ensuring viewers' access to local broadcasters that cable systems do not voluntarily carry. It found that an A/B switch is a "low-cost item" whose "installation costs will be minimal" (1986 Report ¶ 215). It also noted the "relatively low cost and simple installation of indoor antennas," available in set-top and more sensitive attic designs; such antennas permit consumers "to receive signals of acceptable quality" even in locations where outdoor antennas are too costly or prohibited (¶ 166). The FCC considered a variety of technical objections to A/B switches, such as possible signal leakage or "ghosting" caused by improper switch installation or by inadequate isolation between components. But the Commission found these objections "overstated" and concluded that such problems could easily be solved by equipment redesigns pursuant to FCC-mandated standards (¶¶ 142, 165).

While judging switch-and-antenna capability the best long-term solution, the Commission believed that most cable subscribers in 1986 were "unaware of the need to receive broadcast signals off-the-air and [were] unprepared to do so" (1986 Report ¶ 135). The FCC found this state of affairs to be "a direct result of the former must-carry rules," which had created a "misperception" on consumers' part that "broadcast signals will always be available as part of their basic cable service" (¶¶ 46, 121-122). Because the must-carry rules "required cable systems to carry all available off-the-air broadcast television signals," cable subscribers previously "had no reason to be familiar with an input selector device for choosing between cable and off-the-air" reception. *Ibid.*

To correct this consumer misapprehension, the Commission required cable systems to supply their customers with "input selector switches that will enable reception of broadcast signals by means of an antenna," thereby "leaving the subscriber in the same position to receive off-the-air signals as before cable installation" (1986 Report ¶¶ 136, 140). The Commission noted that consumers had already "become familiar with switching between alternative program sources through the use of VCRs," and it concluded that they "will accept cable/broadcast input switching as simply another program source option" (¶ 164). The FCC also required cable operators to "implement a consumer education program to inform their subscribers of the purpose of, and need for, maintaining off-the-air reception capability" (¶ 136).[5]

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[5] Under the consumer education rules, cable systems were required to provide subscribers annually: (1) a list of any local broadcasters not carried by the system; (2) notice that subscribers could obtain access to such broadcasters by use of an antenna and A/B switch; and (3) a description of the function of an A/B switch (1986 Report ¶ 141). Cable systems were also forbidden to suggest that subscribers dismantle their antennas (¶ 140).

To provide an "orderly transition" during a five-year period of consumer acclimatization, the FCC promulgated interim must-carry rules. The Commission found "no need or justification * * * for imposing must carry requirements for [a longer] period," concluding that they "are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals" (1986 Report ¶ 138).

In response to petitions for reconsideration filed by broadcast and cable parties, the FCC in 1987 reaffirmed its policy of encouraging widespread installation of A/B switches. 1987 Report ¶ 1. It concluded that "the information currently before us with respect to switch costs, technical performance, consumer convenience, switch compatibility with other equipment, and use of antennas for off-the-air reception is more than sufficient to support" the practicality of A/B switches (¶ 54).

3. ***The Century Decision***. In an opinion written by Judge Wald and joined by Judges Mikva and McGowan, the court of appeals held that the Commission's revised must-carry rules were likewise unconstitutional. *Century Communications Corp. v. FCC*, 835 F.2d 292 (1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032 (1988). The court agreed with the FCC that switch-and-antenna capability represents a feasible, constitutionally-preferable solution to the carriage issue. But the court discerned no justification even for interim must-carry rules, notwithstanding the FCC's assertion that they were needed "to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold" (835 F.2d at 300).

According to the court, "[t]he lone item of 'hard' record evidence" that the FCC cited to support an interim must-carry regime was a 1986 study commissioned by NAB from the ELRA Group (835 F.2d at 300-301). The court found various methodological flaws in the study and questioned the FCC's wisdom in placing sole reliance on data supplied by NAB, an

interested party (*id.* at 301-302). But even if the study were taken at face value, the court held that it "provide[d] only the spongiest of foundations" for interim must-carry rules (*id.* at 302).

The court also rejected the FCC's submission that "viewer lethargy" and "consumer ignorance" about A/B switches justified an interim must-carry regime. The court observed that many cable systems, desiring to increase channel capacity, offer service on dual cables, which requires subscribers to "'employ switching devices to select between the two cables.'" 835 F.2d at 302, *quoting* 1986 Report ¶ 164. The FCC acknowledged that consumers have "accepted this switching arrangement and do not find it inconvenient." *Ibid.*

More generally, the court refused to "accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes" (835 F.2d at 302):

> In a culture in which even costly items like the video-cassette recorder, the cordless telephone, the compact-disc player, and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within a span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.

Finally, the court held that the FCC's interim must-carry regime would be invalid in any event because of its "lengthy duration" (835 F.2d at 303-304). "It is wholly unclear to us," the court stated, "why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels" (*id.* at 304). The court also expressed skepticism that "any consumer

education campaign will have much impact so long as viewers can continue to rely on must-carry to get their fix of local broadcasts" (*ibid.*). "Opting for a five-year interim period," in the court's view, "merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase, and install the necessary equipment" (*ibid.*).

B. Expert Testimony And Practical Experience Prove The Feasibility Of The Switch-And-Antenna Alternative

Prior approval of switch-and-antenna capability by both the FCC and a unanimous D.C. Circuit surely creates a *prima facie* case that it is a constitutionally acceptable, less restrictive alternative to a must-carry scheme. The evidence introduced on remand overwhelmingly confirms that conclusion. The evidence shows that switching from cable to off-air reception of TV signals is a simple exercise that entails no significant cost, in time or money, for the viewer. With a minimum of effort, cable subscribers can watch — in precisely the same manner as they did before cable existed — any broadcast stations that their cable system chooses not to carry.

1. ***Switching To Off-Air Reception.*** Although a cable subscriber can switch to antenna reception by manually reconnecting wires on the back of the TV set, the most convenient way to do so is by activating an "input selector" or "A/B" switch. "The record shows that most cable-ready TV receivers now on the market have built-in input selector switches operable by remote control." J.S. App. 104a (Williams, J., dissenting). As a rule, therefore, cable subscribers would have to acquire stand-alone A/B switches for use only with older or less-expensive TV sets.

When needed, stand-alone A/B switches are readily available at modest cost from a wide variety of electronics and hardware stores, including such national retail chains as Radio

Shack and Circuit City. J.A. 1221. All A/B switches currently marketed are high-isolation switches intended specifically for use with cable television. The packaging usually bears the following label: "This device is verified to comply with FCC rule Part 15 for use with cable television service." J.A. 1221.

Stand-alone A/B switches come in various shapes and sizes and offer a variety of features. The simplest A/B switch is a mechanical device, operated manually by pushing a button on the switch. J.A. 1222-1223. High-quality switches of this sort (including gold-plated models) are available from Radio Shack for $6.99 and $7.99. J.A. 772, 1222. "[I]t would seem that anyone who could afford cable could also afford the $10 for an A/B switch for use with an old television set." J.S. App. 104a (Williams, J., dissenting).

For slightly more money, consumers can purchase sophisticated A/B switches that offer greater convenience and performance options. *See* 1987 Report ¶¶ 82 & 89 (noting availability of "switch options with premium features," including "multiple source input switches" and "remote control switches"). Stand-alone A/B switches operable by remote control are available for about $40. J.A. 1774. Radio Shack offers a high-isolation three-position A/B switch, operable by remote control, that allows switching between cable, off-air, and a third reception source (such as a video-disc player or VCR). J.A. 1224. One manufacturer offers a "VCR Interface Switch," listed at $25, that accommodates signal inputs from cable, antenna, and a VCR and allows full flexibility among viewing, taping, and play-back of previously taped video material. J.A. 1230.

Stand-alone A/B switches are easy to install. Normal installation takes a few minutes and can readily be done by the consumer, without tools, using instructions enclosed in the package. J.A. 1222-1225. The FCC concluded in 1987 that "those who contend that consumers cannot properly install

switches present no credible evidence to support their claim." 1987 Report ¶ 51. Plaintiffs' expert on remand confirmed the correctness of that conclusion today, testifying that improper switch installation is a "statistically meaningless" problem. J.A. 508, 1779-1780.

Switching from cable to off-air reception is convenient and easy to do. In the vast majority of cases, it involves pushing one button on an A/B switch or remote control pad. J.A. 1225. In some cases, the viewer may need to push a second button, referred to as the "tuning mode" or "cable/normal" switch. Use of the tuning-mode switch is necessary when a viewer wishes to receive off-air UHF signals and does not use a set-top converter (descrambling device) in conjunction with his cable service. *Ibid.* Converters, which are usually required for non-cable-ready sets, are now used in about 70% of cable homes. That percentage will likely rise in the future, so that few cable subscribers would ever need to operate a tuning-mode switch. J.A. 1226-1229, 1242-1244. In any event, use of this switch, when necessary, is convenient; roughly 80% of cable-ready receivers permit switching of the tuning mode by remote control. J.A. 1228.

A/B switches now on the market are reliable and free of technological defects. J.A. 1234. Historically, some concern was expressed about possible "signal leakage" from A/B switches, which could cause unacceptable radiation of cable signals or picture-quality degradation. However, as a result of stringent technical standards issued by the FCC in November 1987, as well as manufacturers' improvements in switch and receiver design, A/B switches now on the market will not cause picture-quality problems. J.A. 1234, 1236-1240, 1780. Defendants' expert admitted that he had no reason to believe that signal leakage is a real problem today. J.A. 440.

2. ***Reception Of Off-Air Signals Via Antenna.*** A receiving antenna is always needed to receive television signals

off-the-air, whether or not the viewer subscribes to cable. J.A. 763, 773. Approximately 36 million households — almost one-third of all U.S. television households — rely solely on antennas to watch television. Many cable households also rely on antennas for second or third TV sets not connected to cable. J.A. 763-764, 773.

There are three main types of antenna: "master" antennas, "indoor" antennas, and "outdoor" antennas. J.A. 764. "Master" antennas are mounted on apartment buildings and condominium complexes to feed broadcast signals to individual dwelling units. They are used where, for convenience or aesthetic reasons, it is impractical for residents to install their own outdoor antennas. J.A. 764.

"Indoor" antennas typically consist of a wire loop for the UHF band and familiar "rabbit ears" for the VHF band. J.A. 764. These set-top antennas enable most households within a station's Grade A contour — typically, within 30-45 miles of the transmitter — to receive high-quality broadcast signals. J.A. 762-764; 1986 Report ¶ 166. NAB itself recently noted that "more than 50% of all TV sets in the U.S. depend on set-top antennas to receive TV programming." *See* J.A. 767-768.

"Outdoor" antennas may be mounted within an attic, for convenience or aesthetic reasons, or attached to a mast beside a dwelling. J.A. 765; 1986 Report ¶ 166 (attic antennas "give additional off-the-air reception capability"). "Outdoor" antennas enable most households within a station's Grade B contour — typically, within 55-60 miles of the transmitter — to receive high-quality broadcast signals. J.A. 762-763, 765.

Antenna reception provides much better picture quality now than it did 30 years ago, owing to improvements in TV receivers and antenna design. Because of increased tuner sensitivity, modern receivers can present high-quality pictures — both in the UHF and VHF ranges — despite relatively low

signal inputs from the antenna. J.A. 766. Amplifiers are now available to boost the antenna signal, permitting use of indoor antennas where outdoor antennas would once have been required. J.A. 766. The efficiency or "gain" of outdoor antennas has been enhanced by design improvements and the use of better transformers. J.A. 765. And further improvements in antenna design can be expected in the future. Noting that "there is a large installed base of TV sets that rely on over-the-air reception," the NAB recently awarded a contract for development of an "Improved Set-Top Antenna." J.A. 767-768.

Television receiving antennas are readily available from department stores, discount appliance stores, and electronics or hardware stores throughout the United States, including such national chains as Sears, Circuit City, Home Depot, and The Wiz. J.A. 768. Good-quality indoor antennas are priced under $20; high-quality amplified indoor antennas cost about $50; attic antennas cost about $40; outdoor antennas range in price from $15 (for a UHF-only antenna) to $100 (for a "multi-use amplified omni-directional" antenna); and separate amplifiers for use with indoor or outdoor antennas cost $20 to $30. J.A. 766, 770-772. Outdoor antennas can be selected and installed by the consumer with little difficulty. J.A. 768-770. Retailers that sell outdoor antennas often offer installation also, with charges commonly ranging between $50 and $150. J.A. 768, 770.

3. ***Practical Experience With A/B Switches.*** Actual experience since enactment of the must-carry law shows that antenna selector switches provide a workable means of ensuring cable subscribers' access to local broadcast stations. As Judge Williams noted below, "[t]he 1992 Cable Act in fact precipitated a controlled experiment in consumer resourcefulness." J.S. App. 105a. The statute gave broadcasters a choice between mandatory carriage on cable systems

("must-carry") and negotiating with cable systems for payment in exchange for carriage ("retransmission consent"). Most stations that did not elect must-carry successfully negotiated retransmission-consent payments. However, "[i]n late 1993 the three major television network local affiliates were unable to reach agreement on retransmission consent with a TCI cable system in Corpus Christi, Texas, resulting in a three-month span in which ABC, CBS, and NBC were all absent from cable." J.S. App. 105a (Williams, J., dissenting). To assist subscribers in obtaining off-air access to network programming during this period, TCI distributed 40,000 A/B switches to subscribers in early October 1993. J.A. 1240.

It is obvious that the switches so distributed were correctly installed by subscribers who needed them, and that the switches functioned properly. "Before the dispute the networks collectively captured a 70% share of the total cable audience; after a month off cable (and with distribution of A/B switches), they had a share of 67%-69% of the total cable audience." J.S. App 105a (Williams, J., dissenting). "I think we surprised a lot of young people," said one station owner. "They didn't know there were other ways to watch TV than through the cable." *Warren's Cable Regulation Monitor*, Nov. 29, 1993, at 7; *Cable World*, Nov. 8, 1993, at 12. The Corpus Christi experience shows that substantial numbers of A/B switches can be installed properly in a short period of time, without meaningful damage to broadcast stations' viewership.

The fact that other media outlets depend heavily on antenna-selector switches to provide access to local broadcast programming provides further evidence of the switches' practical utility. One such industry is the direct broadcast satellite ("DBS") industry, which currently has three major providers: Primestar, DirecTV and USSB. *See* FCC, *First Annual Report to Congress Assessing the Status of Competition*

in the Market for Cable Television and Other Video Programming Services, 59 Fed. Reg. 64657, 64659 (1994).

Subscribers to DBS service "must use an A/B switch to retain access to any local broadcast stations, because the DBS feed does not include them." J.S. App. 106a (Williams, J., dissenting). DBS providers send programming directly to customers' earth-station antennas; because they offer a single, nationwide programming line-up, they cannot carry broadcast stations in each local market. For that reason, many DBS subscribers maintain antennas and switch as desired between satellite and local broadcast reception. Depending on the service provider, this switching capacity may be furnished as part of the satellite receiver or through a stand-alone A/B switch. J.A. 1241. The three DBS services had 1.53 million customers in 1994, and there were projected to be 2.26 million DBS customers in 1995. Paul Kagan & Associates, *Marketing New Media*, Feb. 20, 1995, at 4.

Another industry that relies heavily on A/B switches is terrestrial point-to-multi-point microwave ("MMDS" or "wireless cable"). Because MMDS service has limited channel capacity — 24 to 33 channels are typical — operators usually carry few, if any, local broadcast stations. As is true for DBS customers, MMDS subscribers commonly maintain their own local off-air reception capability and use A/B switches to select microwave or off-air reception as they wish. J.A. 1241-1242. MMDS providers served 430,000 subscribers in 1994 and were projected to serve 620,000 subscribers in 1995. Paul Kagan & Associates, *Marketing New Media*, Feb. 20, 1995, at 4.

In short, about two million of the nation's television households were served in 1994 — and about three million of those households were expected to be served in 1995 — by distribution services that carry few, if any, local broadcast TV stations. Some form of A/B switch is required in each of these homes to obtain access to local broadcasts, and each of these

homes must maintain or install an adequate receiving antenna. The rapid growth of these alternative distribution services shows that consumers are ready, willing and able to achieve switch-and-antenna capacity. And if the need for switches and antennas can readily be accommodated by these emerging technologies, there is no reason to believe it cannot be accommodated by the broadcasting industry as well.[6]

Recent experience with A/B switches and antennas "indicates that consumers themselves are quite capable of adopting these measures when they think the extra [broadcast] programs are worthwhile." J.S. App. 108a n.30 (Williams, J., dissenting). This suggests that market forces alone would suffice to ensure the continued health of local broadcasting. However, "[i]f Congress feared that consumers were insufficiently aware of such switches," it could, without violating anyone's First Amendment rights, "devise a promotional solution tailored to that end" *(ibid.)*. *See Turner*, 114 S.Ct. at 2480 (O'Connor, J.) ("Congress can encourage the creation of new media, * * * or even simple devices that would let people easily switch from cable to over-the-air broadcasting"). One example would be a consumer-education program of the sort the FCC successfully implemented in 1987. Another example would be equipment standards for television manufacturers designed to make switching as effortless as possible — *e.g.*, a requirement that most receivers contain built-in A/B switches operable by remote control. The *Century* court saw merit in such a proposal. *See* 835 F.2d at 304 n.6, *citing* 1986 Report ¶¶ 174-175 & 1987 Report ¶ 56. Indeed, Congress adopted similar requirements in the 1992 Act, which requires the FCC

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[6] Indeed, the growth of these new distribution services partially accounts for consumers' recent propensity to purchase antennas. "[F]rom 1993 to 1994 there was a 51% increase in the sales of indoor antennas (from 3.5 million units to 5.3 million units)." J.S. App. 107a (Williams, J., dissenting).

to issue rules concerning "consumer electronics equipment compatibility." 47 U.S.C. § 544a(c).

In sum, the evidence establishes that switch-and-antenna capability — and any measures that Congress reasonably believes would encourage consumers' convenient use of it — represents a constitutionally permissible, less-restrictive alternative to a must-carry regime. And as Judge Williams noted, the availability of A/B switches points up a more basic defect in the Government's proof. By enabling cable subscribers to watch any broadcaster their cable system does not carry, switch-and-antenna capacity "undermine[s] the claim that the continuation of over-the-air television is in any way in jeopardy or that cable operators have a 'bottleneck' over provision of video services to cable subscribers (a foundation of any claim of anticompetitive behavior)." J.S. App. 103a.

C. Congress's Dismissal Of The Switch-And-Antenna Alternative Was Not Supported By "Substantial Evidence"

Judge Sporkin's discussion of A/B switches, occupying two pages in his opinion (J.S. App. 23a-25a), is cursory at best. He catalogs six items of evidence introduced by defendants, wholly ignoring contrary findings by the FCC and the D.C. Circuit, as well as voluminous evidence introduced by plaintiffs which showed defendants' submissions to be misleading, outdated, and unreliable. With no analysis whatever, Judge Sporkin asserts that there was "substantial evidence" from which Congress "could reasonably conclude that these switches do not represent an equally effective alternative." J.S. App. 23a.

As our co-plaintiffs explain in greater detail, Judge Sporkin's "equally effective" test is legally erroneous. Judge Sporkin was able to find switch-and-antenna capacity "less effective" only because he had already posited, as the

governmental interest underlying must-carry, the conferral of maximum economic benefits on the particular broadcasters electing it. Judge Sporkin's approach, moreover, looks only to one side of the equation — the effectiveness of the means chosen by the Government — ignoring the fact that the option deemed "more effective" imposes dramatically more severe restraints on protected speech.

Apart from legal error, Judge Sporkin's discussion of A/B switches fails on its own terms. The evidence on remand overwhelmingly demonstrates that A/B switches "work" in a technical sense and that switch-and-antenna capability is easily within the means of viewers who can afford cable. As Judge Williams explains (J.S. App. 104a-109a), defendants' argument on remand — reduced to its essentials — consisted of two propositions. First, defendants contended that some unquantified number of cable subscribers would be too ignorant or too lazy to acquire and use A/B switches and antennas to view broadcast stations not carried on their cable system. Second, defendants urged that an additional unquantified number of cable subscribers may either lose access to, or receive a poorer quality picture from, dropped broadcasters because of terrain or man-made obstacles that affect cable subscribers in the same manner that these obstacles affect their neighbors who do not subscribe to cable.

These arguments cannot possibly satisfy defendants' burden of proof, for three main reasons. First, the constitutional rights of cable speakers cannot legitimately be impaired because of the possibility that some cable subscribers may be unwilling to make the modest effort needed to view broadcast programming off-the-air. By use of A/B switches, cable subscribers have the ability to receive such programming at a cost not significantly greater than the cost non-cable viewers must incur to see the same programming. If cable subscribers demur to this modest effort, it can only be because

they have no desire to watch the broadcasters that their cable systems decline to carry. If that is so, it is hard to understand how noncarriage of such stations could jeopardize the health of the local broadcast system. And in any event, "government-mandated carriage seems a rather astonishing solution to a problem now redefined as consumers' occasional need to 'get up'" from their chairs to flick a switch. J.S. App. 106a (Williams, J., dissenting).

Second, protecting the public's interest in "free TV" — by definition — means preserving the ability of TV households to view broadcasts *they can receive over-the-air*. It is undeniably true, as Congress found and defendants urged below, that mountains, skyscrapers, and other obstacles impair off-air reception in certain locations by blocking transmission of broadcast signals. But possible obstruction of over-the-air signals by natural and man-made impediments is an immutable characteristic of the broadcast medium; it has been a fact of life for broadcasting since its birth. The existence of these obstacles does not constitute a "harm" to broadcasting that Congress could legitimately seek to cure by impairing First Amendment rights: the health of the broadcast industry, as a matter of law, is simply not affected by viewers' inability to view inherently non-viewable signals. Commandeering cable channels to extend broadcast stations' reach to viewers who cannot otherwise receive their signals, or who receive them poorly, is a fundamentally illegitimate preference for the financial interests of broadcasters over the First Amendment rights of cable speakers.

Third, even if one were to assume the legitimacy of the preceding two propositions, defendants below made absolutely no showing about the *magnitude* of these problems. Defendants bear the burden of proving that switch-and-antenna capability — which does not impair anyone's First Amendment rights — fails adequately to serve the interests Congress

legitimately seeks to protect. Defendants below made no effort to show that *substantial numbers* of consumers would be afflicted by supposed technological inertia, especially if Congress and the FCC took active steps to encourage use of A/B switches. Nor did defendants quantify the proportion of cable households that would suffer from reception problems despite use of an appropriate antenna; "from all that appears, [weak-signal areas] may represent a very small fraction of the country." J.S. App. 109a (Williams, J., dissenting). In short, while it may be assumed that broadcasters would lose *some* viewers after being dropped from cable, defendants have not proven that they would lose *a sufficient number of viewers* to endanger their own survival, much less to jeopardize the health of the entire broadcast system.

In the pages that follow, we will first show the insubstantiality of the evidence that Congress itself cited in rejecting the switch-and-antenna option. We will then show that the evidence cataloged by Judge Sporkin, to the extent it differs, does nothing to redeem this poor legislative showing.

1. ***Evidence Cited By Congress.*** Section 2(a) of the Act sets forth legislative "findings" designed to cure the flaws discerned by the D.C. Circuit in the government's prior justifications for must-carry. Two of these "findings" concern the switch-and-antenna alternative specifically. Section 2(a)(17) states that

> Consumers who subscribe to cable television often do so *to obtain local broadcast signals which they otherwise would not be able to receive, or to receive improved signals*. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, *or cannot otherwise receive broadcast television services*.

Section 2(a)(18) states that

> Cable television systems *are often the single most efficient distribution system for television programming*. A government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the 'A/B' input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

As Judge Williams explains, the italicized portions of these findings — which reject switch-and-antenna capacity "on the ground that cable in many cases *enhances* broadcast stations' signals or even brings them into areas they could not otherwise reach" — are illegitimate as a matter of law. "[N]either the enhancement of television options for cable subscribers, nor extending broadcast's reach to cable subscribers in otherwise signal-deprived areas, was embraced by [this] Court in *Turner* as an interest substantial enough to justify must-carry." J.S. App. 108a (Williams, J., dissenting). Congress's stated (and only permissible) purpose was to *preserve* the health of local broadcasting, not to *improve upon* its physical limitations at cable's expense.

The remainder of Congress's "findings" are conclusory assertions about the supposedly insuperable barriers posed by the need for switches and antennas. As Judge Williams explains, the undisputed evidence on remand belies these assertions. "Neither switch nor antenna is so mysterious, costly or unworkable as to be beyond the means of a private citizen who values access to a program at the price of a diminutive capital investment and the ongoing cost of pushing the switch when necessary." J.S. App. 108a.

In the 1992 Committee Reports, Congress cited four items of evidence to support its rejection of the switch-and-antenna alternative. First, it relied on the 1986 study, commissioned by

NAB from the ELRA Group, which concluded that cable subscribers rarely used A/B switches while prior must-carry rules were in effect. *See* S. Rep. 102-92, 102d Cong., 2d Sess. 45 & n.116 (1992), *citing* ELRA Group, Inc., "Outdoor Antennas, Reception of Local Television Signals and Cable Television" (Jan. 28, 1986), J.A. 20-22. This is the same study that the *Century* court in 1987 termed "the spongiest of foundations" for must-carry, describing it as "a melange of disparate facts and findings" tainted by "survey imperfections." 835 F.2d at 301-302; *see* pages 22-23, *supra*. The ELRA study's core finding was that in 1985 "only about 10% of subscribers presently switch back and forth between cable and antennas" (835 F.2d at 301). But this finding provided no logical support for the conclusion that switches and antennas are inconvenient, expensive, or difficult to install. "More likely," the court explained, "the absence of such equipment from most homes reflects the obvious reality that, so long as the government requires cable companies to offer local broadcasting through the must-carry regime, such supplemental equipment is unnecessary" (*ibid.*). Absent must-carry, said the court, "[c]ommon sense suggests that consumers who want to receive an off-the-air channel will quickly observe that they need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations" (*ibid*).

The second item of evidence cited by Congress consisted of comments that NAB submitted to the FCC in December 1986, seeking reconsideration of the Commission's 1986 Report. *See* S. Rep. 102-92, at 45 & n.115 (citing NAB comments); H.R. Rep. 102-628, at 54 & n.60 (same). These comments alleged a variety of technical problems with A/B switches and raised convenience and cost objections to them. *See* 1987 Report ¶¶ 10-12 (summarizing NAB objections). In its opinion on reconsideration, the FCC exhaustively analyzed these objections and found most of them to have no factual

support (1987 Report ¶¶ 50-57). However, the FCC did find merit in concerns that poor isolation between the "A" and "B" sides of the switch could cause signal leakage or "ghosting" (¶¶ 52 & 92-93). The Commission accordingly announced its intention to convene a separate rulemaking to consider technical standards for A/B switches (¶ 94). In that later rulemaking, completed in November 1987, the FCC propounded more stringent performance standards for antenna-selector switches, effectively increasing the required isolation by a factor of 100 (from 60dB to 80dB). *See* 47 CFR §§ 15.115 & 15.117; J.A. 1232, 1234-1235. In short, of all the technical problems that NAB alleged in 1986, the FCC had already remedied the sole problem that it found to have any factual basis — potential signal leakage — a full five years before the Cable Act was passed. *See* page 26, *supra*. Congress's reliance in 1992 on NAB's stale charges was thus entirely misplaced.

The third item of evidence on which Congress relied in rejecting the switch-and-antenna option was testimony delivered by Edward Fritts, president of NAB, and Preston Padden, then president of INTV, at a 1989 committee hearing. *See* S. Rep. 102-92, at 45 & n.114, *citing* "Must Carry," Hearing before the Subcomm. on Communications of the Senate Commerce Comm. (101-427), Oct. 25, 1989 ("Must-Carry Hearing"), at 39, 80. But this testimony adds nothing to the "evidence" discussed above. Fritts relied on the 1986 ELRA study. *See* Must-Carry Hearing, at 39. And Fritts and Padden both relied on NAB's petition for reconsideration of the FCC's 1986 Report. *See* Must-Carry Hearing, at 39, 80. Both witnesses, in short, were simply regurgitating arguments that the NAB had made back in 1986 — arguments that the FCC

and the *Century* court had exhaustively considered and rejected.[7]

The final piece of evidence on which Congress relied in rejecting the switch-and-antenna alternative was a 1991 survey by Mark Fratrick, NAB's in-house economist, which purported to update the ELRA study's results. *See* H.R. Rep. 102-628, at 54 & nn. 62, 63, *citing* Fratrick, "A/B Switch Availability and Use," Sept. 23, 1991, J.A. 128-133. Having been drafted by NAB's in-house economist, the Fratrick survey is unlikely to have been biased in cable systems' favor. Yet far from supporting Congress's conclusion that "consumers are not willing to use A/B switches" (H.R. Rep. 102-628, at 54), the Fratrick survey supports the opposite conclusion.

The Fratrick survey estimated that, as of 1991, 33% of cable households had one or more TV sets connected to cable and an antenna; that 48% of such households had A/B switches; and that 38% of households with A/B switches had used them. J.A. 131. While Congress viewed these results as indicating that A/B switches are unworkable, the results actually show a substantial increase in consumers' switch-and-antenna capability between 1986 and 1991. The ELRA study, for example, estimated that only 1% of cable households had an outdoor antenna and an A/B switch. J.A. 21, 22. This improvement in consumers' switch-and-antenna capability between 1986 and 1991 is quite remarkable: the evidence on remand established that cable systems during this period volun-

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[7] Congress in 1992 also noted the FCC's finding that some cable systems had encouraged subscribers to take down their antennas, thus preventing reception of off-air signals. S. Rep. 102-92, at 45; H.R. Rep. 102-628, at 54. This too is ancient history. The FCC did observe this behavior by cable systems *in 1986* (1986 Report ¶¶ 121, 168). Since 1987, however, cable systems — as required by FCC rules — have informed subscribers about the need to *maintain* off-the-air reception capability. *See* 1986 Report ¶ 140; 47 CFR § 76.66 (1991).

tarily carried more than 95% of broadcast signals, so that subscribers' need to acquire switches and antennas was not very urgent. This improvement is a clear tribute to the efficacy of the FCC's consumer-education program.[8]

In sum, the evidence on which Congress relied in 1992 to support rejection of the switch-and-antenna alternative cannot, by any stretch of the imagination, be termed "substantial evidence." This is not a case in which Congress sought out independent experts to provide objective and dispassionate testimony on a technical subject. Rather, Congress relied almost exclusively on data submitted by NAB and INTV — interested parties and consistent opponents of A/B switches as an alternative to must-carry. Most of this "evidence" dated back to 1986; had previously been considered by the FCC and the D.C. Circuit; and had been found by both to have no factual basis. The NAB's objections were neither timely nor fresh: to the extent they had merit in 1986, they had been mooted by 1992 as a result of technological improvements or subsequent FCC action. The one bit of new "evidence" — the 1991 Fratrick survey — was tainted by survey imperfections that cause it to understate consumers' switch-and-antenna

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[8] Because of the way the Fratrick survey was conducted, it understates the extent to which cable subscribers *actually switch* between cable and off-air reception. The ELRA study revealed that only 15% of subscribers who alternated between cable and off-air reception in 1985 used A/B switches to do so; the other 85% manually reconnected wires on the back of the TV set or used some other method. J.A. 21. The Fratrick survey, however, neglected to ask subscribers about reconnecting wires or other methods of switching to off-air reception. Rather, it asked simply, "On how many sets do you have a switch that allows you to switch back and forth between the cable and an outside or set-top antenna?" and "Have you ever used that switch?" J.A. 133. This obvious survey imperfection — the ELRA survey, which Fratrick was purporting to update, specifically asked (in question 21) about reconnecting wires and other methods of switching — seriously impugns the reliability of the Fratrick survey's results.

capability. Yet even those biased results show that switch-and-antenna capacity was much more widespread in 1992 than it was in 1987, when the Commission and the *Century* court approved it as a constitutionally-preferable alternative to must-carry.

2. ***Evidence Cited By Judge Sporkin.*** We have already discussed one piece of evidence cataloged by Judge Sporkin (J.S. App. 24a-25a) — the 1991 consumer survey by Mark Fratrick, NAB's in-house economist, which Congress also cited. Judge Sporkin also lists a 1987 petition for reconsideration filed with the FCC alleging a "risk of signal degradation and signal leakage" from A/B switches (J.S. App. 24a & n.47). As we have explained previously, to the extent signal leakage was a risk in 1987, the problem has been cured by subsequent FCC rulemaking; defendants' expert admitted that signal leakage is not a problem in the real world today. *See* pages 26 & 38, *supra*. In citing these 1987 objections, therefore, Judge Sporkin was making a mere debater's point. As is true elsewhere, he made no effort to find out whether the objections on which he relied had any current validity.

Judge Sporkin next cites a 1986 NCTA study contending that "the costs entailed by A/B switches 'far outweigh the benefits.'" J.S. App. 24a & n.48. This study accompanied NCTA's petition for reconsideration of the FCC's 1986 Report, which the cable industry did oppose on financial grounds. That was because the 1986 Report would have mandated *universal installation* of A/B switches — regardless of subscribers' need or desire for them — with all material and labor costs borne by the cable operator (1986 Report ¶ 140). Cable operators objected that a "universal installation" requirement would impose capital costs in excess of $1 billion, with much of this money simply being wasted. *See id.* ¶ 10.

The FCC *agreed* with these submissions. It accordingly revised its rules to require that cable operators simply *offer* A/B

switches to their customers, then install switches for those who wanted them. The final rules also permitted operators to charge for the labor and material costs of installation (except where switches were added as part of a new customer hook-up). *See* 1987 Report ¶¶ 80-84. These revisions relieved cable operators' concerns that A/B switch rules would impose unreasonably large capital costs. *See* J.A. 1781-1782.[9]

Judge Sporkin also cites two items of evidence introduced by defendants on remand. The first is the report of Eldon Haakinson, who testified that use of A/B switches may entail "complexity" and "viewer inconvenience." J.S. App. 25a & n.49. Mr. Haakinson's qualifications as an expert on this subject are suspect,[10] and his discussion of A/B switches derives almost entirely from material prepared by others. *See* J.A. 601-602, 605, 607-611. In any event, his hearsay assertions do not represent "substantial evidence." They are

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[9] Judge Sporkin attempts to create the impression that the cable industry after 1987 continued to oppose A/B switches by quoting out of context a statement by James Mooney, then-president of NCTA, in a 1990 committee hearing. J.S. App. 23a-24a & n.46. In fact, Mr. Mooney testified that "NCTA does not have major substantive problems with mandating electronic switches in television sets." He further testified that "the cable industry would probably welcome electronic A/B/C switches if the broadcast industry pursues its [retransmission consent] proposal." "Cable TV Consumer Protection Act of 1989," Hearing before the Subcomm. on Communications of the Senate Commerce Comm. (101-702), Mar. 29, 1990, at 108.

[10] Mr. Haakinson is an expert in the physics of television and radio signal transmission, *i.e.*, the propagation characteristics of radio waves emitted from broadcast transmitter towers. As he states in his declaration (J.A. 581), his expertise is limited to "the field of telecommunications propagation." His curriculum vitae reveals no experience in the field of consumer electronics. *See* J.A. 386-392, 580-581. Of the 32 publications he has authored, not a single one deals with A/B switches, television receivers, or other consumer-electronics issues. *See* J.A. 581.

controverted by the prior findings of the FCC and the D.C. Circuit, as well as by the testimony of David Large, an undisputed expert on the subject of A/B switches and cable electronics.

Finally, Judge Sporkin relies on a 1993 survey finding that "68% of consumers find A/B switches 'fairly or very inconvenient.'" J.S. App. 25a & n.50. In his dissent (J.S. App. 104a-106a), Judge Williams shows the error of this reliance. The survey canvassed subscriber reactions to the Corpus Christi retransmission consent dispute (discussed at pages 28-29 above). About 80% of the subscribers who found A/B switches "inconvenient" did so on the ground that they "[h]ad to get up" to operate the switch (J.S. App. 106a). However, if the networks had remained off cable for an extended period — all three were in fact restored to carriage after just six weeks — any subscriber could have purchased a remote-controlled A/B switch at modest cost to obviate such "inconvenience." *See* J.A. 1774. In any event, the key point is that, despite the supposed "inconvenience," TCI's subscribers in fact installed and used their switches successfully, with the result that the broadcasters experienced no meaningful ratings decline while off cable. The Corpus Christi experience thus confirms the correctness of the FCC's and the D.C. Circuit's conclusions that cable subscribers can and will use A/B switches to watch non-carried broadcast stations they desire to view.

CONCLUSION

For these reasons, the judgment of the three-judge district court should be reversed, and sections 4 and 5 of the 1992 Cable Act should be declared unconstitutional.

Respectfully submitted,

ALBERT G. LAUBER, JR. *
PETER VAN N. LOCKWOOD
CAPLIN & DRYSDALE, CHTD.
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000

Of Counsel:

JUDITH A. MCHALE
MARK HOLLINGER
DIANE L. HOFBAUER
DISCOVERY
COMMUNICATIONS, INC.
7700 Wisconsin Avenue
Bethesda, MD 20814
(301) 986-1999

* *Counsel of Record*

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